Gee Boon Kee & Ors v Tan Pok Shyong as legal representative of the estate of Tan Ah Tong

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-34–04 OF 2017(W)
ZULKEFLI PCA, SURIYADI, HASAN LAH, ZAINUN ALI AND AZIAH ALI FCJJ
6 NOVEMBER 2017

Limitation — Specific performance — Specific performance of sale and purchase agreements — Inherent jurisdiction of court to overcome inconsistency to grant reliefs — Whether limitation applied to bar application to have carriage of decree of specific performance — Whether application to have carriage of decree of specific performance to completion action upon judgment — Whether decision in Daud v Ibrahim applied to application to have carriage of decree of specific performance to completion — Limitation Act 1953 s 6(3)

Sometime in 1973, the appellants entered into sale and purchase agreements ('SPAs') with one Tan Ah Tong in respect of two pieces of land, namely, Lots 512 and 513. The two pieces of land were then charged to the bank on 1974 by Tan Ah Tong. In 1986, the appellants sought for two reliefs at the High Court, namely: (a) a declaration that Tan Ah Tong was a trustee of the said land for the appellants; and (b) specific performance of the SPAs between the appellants and Tan Ah Tong. In March 2000, the High Court granted the order 'that there be specific performance of the contracts for the plaintiffs except the 29th plaintiff against the first, second and third defendants' ('the 2000 Order'). On 27 July 2000, Tan Ah Tong charged Lot 512 again to RHB Bank Bhd. Dissatisfied with the 2000 Order, Tan Ah Tong appealed to the Court of Appeal but the appeal was dismissed. Tan Ah Tong died and his son ('the respondent') was substituted as the legal representative of the estate of Tan Ah Tong. Meanwhile, Lot 512 was auctioned off by RHB Bank. The appellants caveated Lot 513 to protect their interest. This was objected by the respondent. In 2015, the appellants sought an order of the High Court that the respondent transfer Lot 513 to the appellants ('encl 292'). In granting orders in term of the application, the High Court held that: (i) it had the inherent power to grant such orders so as to prevent injustice pursuant to O 92 r 4 of the Rules of Court 2012; (ii) since the SPAs were no longer capable of being specifically enforced in accordance with their terms as a result of the foreclosure proceedings in respect of Lot 512, it would be open to the High Court to order that Lot 513 be instead transferred to the appellants; and (iii) the fact that specific performance was granted in the 2000 order meant that the respondent was a trustee of the land for the benefit of the appellants and as such, s 22(1) of the Limitation Act 1953 ('the Act') applied and the appellants were not barred by

limitation. The respondent appealed to the Court of Appeal. The Court of Appeal disagreed with the High Court that it could invoke the court's inherent jurisdiction to overcome the inconsistency to grant the reliefs to the appellants. The Court of Appeal further held that: (1) in the 2000 order, the High Court only granted an order of 'specific performance' but did not allow the prayer for a declaration that Tan Ah Tong was a trustee; and (2) the application made by the appellants was an 'action', as defined in s 2(1) of the Act. It was therefore a 'proceeding in a court of law' and the appellants' application was barred by limitation pursuant to s 6(3) of the Act. Hence, the present appeal. The issues that arose were: (a) whether limitation applied to bar an application to have carriage of a decree of specific performance; (b) whether an application to have carriage of a decree of specific performance to completion is an action upon a judgment within s 6(3) of the Act; and (c) whether the decision in *Daud v Ibrahim* applied to an application to have carriage of a decree of specific performance to completion.

Held, allowing appeal with costs:

(1) The Court of Appeal failed to consider the effect of the incidental or ancillary order made by the Court of Appeal to the 2000 Order where the appellants were given liberty to make application for additional orders in respect of the order for specific performance. By filing the application in encl 292, the appellants were, in effect, carrying that decree to completion. As such, it was not correct to say that by filing encl 292, the appellants were filing a fresh action. Furthermore, once specific performance has been decreed, no question of filing a fresh action arises. When an order for specific performance is made, the contract remains in effect and is not merged in the judgment for specific performance, and a court of equity or one exercising equity jurisdiction, maintains full control of the matter (see paras 38–39).

(2) The Court of Appeal, inter alia, relied on the decision in *Daud v Ibrahim* to hold that the appellants' application under encl 292 was barred by the limitation of 12 years under s 6(3) of the Act. The facts in that case were distinguishable. In the instant case, the Court of Appeal had made incidental order in 2005 in respect of the carriage of the specific performance decree. The appellants made their application pursuant to that incidental order. As such, the issue in the instant case concerned with the court's continued supervisory control over the specific performance decree in its equitable jurisdiction (see paras 45 & 52).

(3) Based on the decision of the English cases, the word 'action' in ss 2(1) and 6(3) of the Act must mean a fresh action and did not include an application to have carriage of a decree of specific performance to completion. Enclosure 292 was not a fresh action. The appellants were not suing for a decree of specific performance as they already had a decree.

A The appellants were merely carrying that decree to completion and the order of the Court of Appeal in 2005 gave them liberty to pursue the carriage of the order (see paras 56–57).

(4) Section 6(3) of the Act was not applicable. The appellants' application B was filed within the 12 years period. The appellants filed their application pursuant to the incidental order given by the Court of Appeal in 2005. Enclosure 292 was filed by the appellants in 2015. It was therefore filed within 12 years from the date of the order of the Court of Appeal. This was an appropriate case for the court to exercise its inherent power to C order Lot 513 be transferred to the appellants. The three questions of law posed in this appeal were answered in the negative (see paras 58 & 62–63).

[Bahasa Malaysia summary

D Pada kira-kira 1973, perayu-perayu memasuki perjanjian-perjanjian jual beli ('PPJB') dengan seorang bernama Tan Ah Tong bagi dua bidang tanah, khususnya Lot 512 dan 513. Kedua-dua bidang tanah ini seterusnya dipajakkan pada bank pada 1974 oleh Tan Ah Tong. Pada 1986, perayu-perayu memohon dua relif di Mahkamah Tinggi iaitu: (a) satu deklarasi bahawa Tan E Ah Tong adalah pemegang amanah tanah-tanah tersebut bagi pihak perayu-perayu; dan (b) pelaksanaan spesifik PPJB antara perayu-perayu dan Tan Ah Tong. Pada Mac 2000, Mahkamah Tinggi membenarkan perintah 'bahawa terdapat pelaksanaan spesifik kontrak-kontrak plaintif kecuali plaintif ke-29 terhadap defendan pertama, kedua dan ketiga' ('Perintah 2000'). Pada F 27 Julai 2000, Tan Ah Tong memajakkan Lot 512 sekali lagi kepada RHB Bank Bhd. Tidak berpuas hati dengan Perintah 2000, Tan Ah Tong merayu ke Mahkamah Rayuan tetapi rayuan ini ditolak. Tan Ah Tong meninggal dunia dan anak lelakinya ('responden') digantikan sebagai wakil guaman estet Tan Ah Tong. Sementara itu, Lot 512 dilelong oleh RHB Bank. Perayu-perayu G mengkaveatkan Lot 513 untuk melindungi kepentingan mereka. Ini dibantah oleh responden. Pada 2015, perayu-perayu memohon perintah Mahkamah Tinggi agar responden memindah milik Lot 513 kepada perayu-perayu ('lampiran 292'). Dalam membenarkan perintah bersyarat permohonan ini, Mahkamah Tinggi memutuskan: (i) mempunyai kuasa inheren untuk H membenarkan perintah sedemikian untuk mengelakkan ketidakadilan, di bawah A 92 k 4 Kaedah-Kaedah Mahkamah 2012; (ii) memandangkan PPJB tidak lagi boleh dikuatkuasakan mengikut terma-termanya akibat prosiding pelucuthakkan bagi Lot 512, adalah terbuka untuk Mahkamah Tinggi memerintahkan agar Lot 513, sebaliknya dipindah milik kepada I perayu-perayu; dan (iii) fakta bahawa pelaksanaan spesifik dibenarkan dalam Perintah 2000 bermaksud respoden adalah pemegang amanah tanah bagi manfaat perayu-perayu dan dengan itu. Seksyen 22(1) Akta Had Masa 1953 ('Akta') terpakai dan perayu-perayu tidak terhalang oleh had masa. Responden merayu ke Mahkamah Rayuan. Mahkamah Rayuan tidak bersetuju dengan

Mahkamah Tinggi bahawa Mahkamah Tinggi boleh membangkitkan bidang kuasa inheren mahkamah untuk mengatasi ketidakselarasan untuk memberi relif-relif kepada perayu-perayu. Mahkamah Rayuan seterusnya memutuskan bahawa: (1) dalam Perintah 2000, Mahkamah Tinggi hanya membenarkan perintah 'pelaksanaan spesifik' tetapi tidak membenarkan permohonan bagi deklarasi bahawa Tan Ah Tong adalah pemegang amanah; dan (2) permohonan yang dibuat oleh perayu adalah 'tindakan', seperti yang ditakrifkan dalam s 2(1) Akta. Oleh itu, ini adalah 'prosiding dalam mahkamah undang-undang' dan permohonan perayu dihalang oleh had masa di bawah s 6(3) Akta. Oleh itu, rayuan ini difailkan. Isu-isu yang timbul adalah: (a) sama ada had masa terpakai untuk menghalang permohonan untuk membawa satu dekri pelaksanaan spesifik; (b) sama ada permohonan untuk membawa satu dekri pelaksanaan spesifik hingga sempurna adalah tindakan dalam penghakiman di bawah s 6(3) Akta; dan (c) sama ada keputusan dalam *Daud v Ibrahim* memohon terpakai pada untuk membawa dekri pelaksanaan spesifik hingga sempurna.

Diputuskan, membenarkan rayuan dengan kos:

(1) Mahkamah Rayuan gagal menimbangkan kesan perintah sampingan atau ansilari yang dibuat oleh Mahkamah Rayuan pada Perintah 2000 di mana perayu diberi kebebasan untuk membuat permohonan untuk perintah tambahan berkenaan perintah untuk pelaksanaan spesifik. Dengan memfailkan permohonan tersebut dalam lampiran 292, perayu telah, dengan sendirinya, membawa dekri tersebut hingga sempurna. Oleh itu, tidak betul untuk mengatakan bahawa dengan memfailkan lampiran 292, perayu memfailkan tindakan baharu. Tambahan lagi, apabila pelaksanaan spesifik telah ditetapkan, tidak ada persoalan memfailkan tindakan baharu. Apabila satu perintah untuk pelaksanaan spesifik dibuat, kontrak tersebut masih berlaku dan tidak digabungkan dalam penghakiman untuk pelaksanaan spesifik dan mahkamah ekuiti atau orang yang menjalankan bidang kuasa ekuiti, kekal mengawal penuh hal perkara tersebut (lihat perenggan 38–39).

(2) Mahkamah Rayuan, antara lain, bersandar pada keputusan *Daud v Ibrahim* untuk memutuskan permohonan perayu bawah lampiran 292 dihalang oleh had masa 12 tahun bawah s 6(3) Akta. Fakta dalam kes ini dibezakan. Dalam kes ini, Mahkamah Rayuan telah membuat perintah sampingan pada tahun 2005 berkenaan pembawaan dekri pelaksanaan spesifik. Perayu membuat permohonan mereka berasaskan perintah sampingan tersebut. Oleh itu, isu dalam kes ini adalah berkenaan kawalan penyeliaan berterusan oleh mahkamah terhadap keputusan pelaksanaan spesifik dalam bidang kuasa inheren (lihat perenggan 45 & 52).

(3) Berdasarkan keputusan kes-kes Inggeris, perkataan 'tindakan' dalam

ss 2(1) dan 6(3) Akta semestinya bermaksud tindakan baharu dan tidak termasuk permohonan untuk membawa satu dekri pelaksanaan spesifik hingga selesai. Lampiran 292 bukan tindakan baharu. Perayu tidak menyaman bagi dekri pelaksanaan spesifik kerana mereka telah mempunyai dekri. Perayu hanya membawa dekri tersebut hingga selesai dan perintah Mahkamah Rayuan pada tahun 2005 memberi mereka kebebasan untuk meneruskan pembawaan perintah tersebut (lihat perenggan 56–57).

(4) Seksyen 6(3) Akta tidak terpakai. Permohonan perayu difailkan dalam tempoh 12 tahun. Perayu-perayu memfailkan permohonan mereka menurut perintah sampingan yang diberikan oleh Mahkamah Rayuan pada tahun 2005. Lampiran 292 telah difailkan oleh perayu pada tahun 2015. Oleh itu, ia difailkan dalam tempoh 12 tahun dari tarikh perintah Mahkamah Rayuan. Ini adalah kes yang sesuai untuk mahkamah jalankan kuasa inherennya untuk memerintahkan Lot 513 dipindahkan ke perayu. Ketiga-tiga soalan undang-undang yang ditimbulkan dalam rayuan ini dijawab dengan negatif (lihat perenggan 58 & 62–63).]

Notes

For cases on specific performance in general, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2608–2613.

Cases referred to

Daud v Ibrahim [1961] 1 MLJ 43, CA (distd)
Husainsab Goususab (Kareemsab) v Krishnarao Sheshagirirao 2002 (5) KarLJ 137, HC (refd)
Jai Narain Ram Lundia v Kedar Nath Khetan and others 1956 AIR 359, SC (refd)
Johnson and another v Agnew [1979] 1 All ER 883, HL (refd)
Lowsley and another v Forbes (t/a LE Design Services) [1998] 3 All ER 897, HL (refd)
Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 2 All ER 304, CA (refd)
Seema Development Sdn Bhd v Mah Kim Chye [2014] 2 MLJ 425, HC (refd)
Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd [1989] 2 MLJ 155, SC (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385, FC (refd)
WT Lamb & Sons v Rider; Same v Same [1948] 2 All ER 402, CA (refd)
Yarwinder Gill v Siu-May Tsang, Pamigold Limited [2003] WL 21554631, Ch D (refd)

Legislation referred to

Limitation Act 1939 (repealed by Limitation Act 1980) [UK] s 2(4)
Limitation Act 1953 ss 2(1), 6, 6(3), (6), 22(1)
Limitation Act 1963 [IND] art 136

Limitation Act 1980 [UK] ss 24(1), 36(1)(f), 38(1)
Rules of Court 2012 O 92 r 4

Appeal from: Civil Appeal No W-02(A)-670–04 of 2016 (Court of Appeal, Putrajaya)

Gopal Sri Ram (Sri Dev Nair and David Yii with him) (Sri Dev & Naila) for the appellants (except the 16th appellant).
R Kandiah (Mohd Latip & Assoc) for the 16th appellant.
Danny Yap Sin Leng (Kelly Wong Kai Yi with him) (Shyong Wee & Danny) for the respondent.

Hasan Lah FCJ (delivering judgment of the court):

INTRODUCTION

[1] This appeal arose from the decision of the Court of Appeal given on 11 October 2016 wherein the appeal by the respondent was allowed with costs.

[2] On 5 April 2017, leave to appeal was granted to the appellants on the following questions of law:

(a) whether limitation applies to bar an application to have carriage of a decree of specific performance having regard to the decision of the House of Lords in *Johnson and another v Agnew* [1979] 1 All ER 883;

(b) whether an application to have carriage of a decree of specific performance to completion is an action upon a judgment within s 6(3) of the Limitation Act 1953 having regard to the decision in *Lowsley and another v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 as applied in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; and

(c) whether the decision in *Daud v Ibrahim* [1961] 1 MLJ 43 applies to an application to have carriage of a decree of specific performance to completion having regard to the decision in *Johnson and another v Agnew* [1979] 1 All ER 883.

[3] The appellants were the plaintiffs in the High Court and the respondent was the first defendant. There were altogether 29 plaintiffs in the High Court.

BACKGROUND FACTS

[4] The relevant background facts as laid down by the Court of Appeal are these. The appellants sometime in 1973 entered into sale and purchase

agreements with Tan Ah Tong in respect of two pieces of land, namely, Lots 512 and 513 in Ulu Kelang. The purchase price was paid in full by the appellants.

[5] The two pieces of land were then charged to Chase Manhattan Bank on 11 February 1974 by Tan Ah Tong.

[6] In May 1986, the appellants took out a legal action in Originating Summons No F31–90 of 1986 and sought for two reliefs, namely, a declaration that Tan Ah Tong is a trustee of the said land for the appellants and specific performance of the sale and purchase agreements between the appellants and Tan Ah Tong.

[7] On 25 March 2000, after a full trial of the aforesaid suit, the High Court granted the following order ('2000 Order'):

> that there be specific performance of the contracts for the plaintiffs except 29th plaintiff against the first, second and third defendants.

[8] On 27 July 2000, Tan Ah Tong charged Lot 512 again to RHB Bank Bhd (previously known as Bank Utama).

[9] Dissatisfied with the 2000 Order, Tan Ah Tong appealed to the Court of Appeal. On 25 October 2005, the Court of Appeal dismissed his appeal. Leave to appeal against that decision was refused by this court on 5 July 2006.

[10] Tan Ah Tong died on 7 April 2011 which resulted in his son Tan Pok Shyong being substituted as the legal representative of the estate of Tan Ah Tong.

[11] Meanwhile, Lot 512 was auctioned off by RHB Bank at Gombak Land Office on 13 March 2014.

[12] The appellants caveated Lot 513 to protect their interest.

[13] The respondent, as the legal representative of the estate of Tan Ah Tong, objected to the land office of the entry of the caveat on Lot 513 by the appellants.

[14] On 7 October 2015, the appellants then filed the application (encl 292) which is the subject matter of the appeal before this court for an order, inter alia, that the respondent transfer Lot 513 to the appellants. The application was amended by an order of the court dated 10 March 2016.

[15] On 10 March 2016, the High Court granted orders in term of the

application. It was also ordered that the appellants are to hold the estate of Tan Ah Tong's undivided share in Lot 513 on trust for the estate.

DECISION OF THE HIGH COURT

[16] On the issue of whether the High Court was seized with the jurisdiction to grant the orders prayed for in the application, the learned judicial commissioner (as he then was) held that the High Court has inherent power to grant such orders so as to prevent injustice pursuant to O 92 r 4 of the Rules of Court 2012.

[17] The learned judicial commissioner held that due to the fact that the sale and purchase agreements were no longer capable of being specifically enforced in accordance with their terms as a result of the foreclosure proceedings in respect of Lot 512, it would be open to the High Court to order that Lot 513 be instead transferred to the appellants pursuant to the inherent jurisdiction of the High Court.

[18] Based on the circumstances of the case, the learned judicial commissioner ruled that it was appropriate to exercise the inherent power of the court to order relief that differs from the 2000 Order.

[19] As regards the issue of limitation, the learned judicial commissioner opined that the fact that specific performance was granted in the 2000 Order meant that the respondent was by necessary implication a trustee of the land for the benefit of the appellants. As such s 22(1) of the Limitation Act 1953 applies and the appellants were not barred by limitation.

DECISION OF THE COURT OF APPEAL

[20] The Court of Appeal agreed with the learned judicial commissioner's view that the reliefs sought for by the appellants were inconsistent with the terms of the 2000 Order. However, the Court of Appeal disagreed with the learned judicial commissioner's view that he could invoke the court's inherent jurisdiction to overcome the inconsistency to grant the reliefs to the appellants.

[21] The Court of Appeal held that in the 2000 Order the High Court only granted an order of 'specific performance' but did not allow the prayer for a declaration that Tan Ah Tong was a trustee.

[22] The application made by the appellants was an 'action' as defined in s 2(1) of the Limitation Act 1953. It was therefore a 'proceeding in a court of law' and the appellants' application was barred by limitation pursuant to s 6(3) of the Limitation Act 1953. The Court of Appeal relied on the decision in

A *Daud v Ibrahim* [1961] 1 MLJ 43 and *Seema Development Sdn Bhd v Mah Kim Chye* [2014] 2 MLJ 425 as the basis of its decision.

SUBMISSIONS OF THE APPELLANTS

B **[23]** Learned counsel for the appellants submitted that the Court of Appeal failed to appreciate that there was no necessity for the appellants to file a fresh action to recover the property as the Court of Appeal (in regards to the appeal by the respondent against the 2000 Order) had on 25 October 2005 made the following incidental or ancillary order:

C

> DAN DIPERINTAHKAN bahawa Responden-Responden dibenarkan membuat permohonan kepada Mahkamah Tinggi untuk Perintah-Perintah tambahan berkenaan dengan Pelaksanaan Spesifik.

D **[24]** It was contended that the decision of the Court of Appeal was contrary to settled law. This was a case where the appellants were merely carrying the decree of specific performance to completion, and the order of the Court of Appeal dated 25 October 2005 gave the appellants liberty to pursue the carriage of the order. As such, the Limitation Act 1953 does not apply to the

E facts of this case because the contract remains in force and does not merge into the decree and a Court of Equity maintains full control and supervision over its decrees. In support of that proposition learned counsel cited the case of *Johnson and another v Agnew*.

F **[25]** It was also submitted that once specific performance has been decreed no question of filing a fresh action arises. The Limitation Act 1953 has no application to the enforcement of the specific performance decree because the court exercises equitable jurisdiction over the carriage of the order. The

G following cases were cited for the proposition:

(a) *Yarwinder Gill v Siu-May Tsang, Pamigold Limited* [2003] WL 21554631;

(b) *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2

H MLJ 385;

(c) *WT Lamb & Sons v Rider; Same v Same* [1948] 2 All ER 402;

(d) *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304; and

I (e) *Lowsley and another v Forbes (t/a LE Design Services)* [1998] 3 All ER 897.

[26] It was therefore submitted that the three questions of law posed in this appeal must be answered in the negative.

SUBMISSIONS OF THE RESPONDENT

[27] With regard to the first question of law posed in this appeal, learned counsel for the respondent submitted that on the facts of *Johnson and another v Agnew* the decision was not applicable to the instant case. It was contended that what was held in *Johnson and another v Agnew* was that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. The court may then award damages at common law for breach of contract since the contract was not rescinded ab initio but remained in existence until it was terminated by the court.

[28] It was also contended that *Johnson and another v Agnew* did not deal with the issue of limitation. In the instant case the limitation for enforcement of the said order as stipulated under s 6(3) of the Limitation Act 1953 applies. Furthermore, the appellants failed to give any explanation on the delay in taking action to execute the 2000 Order. The 2000 Order became impossible to be performed due to the appellants' own laches.

[29] With regard to the second question of law posed in this appeal, learned counsel for the respondent submitted that on the facts of this case the provision of sub-ss (3) and (6) of s 6 of the Limitation Act 1953 are applicable to the appellants' application in encl 292. It was argued that the Malaysian provisions are different from s 36(1)(f) of the English Limitation Act 1980 which expressly excludes limitation period for the enforcement of judgment for a claim of specific performance.

[30] Learned counsel referred to the Indian High Court case of *Husainsab Goususab (Kareemsab) v Krishnarao Sheshagirirao* 2002 (5) KarLJ 137 which dealt with art 136 of the Indian Limitation Act 1963 which provides a limitation period of 12 years 'for the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court'. It was held in that case that execution of a decree of specific performance would be caught by art 136.

[31] It was also submitted that the limitation under s 6(3) of the Limitation Act 1953 would still apply to the appellants' application even if they were not undertaking a fresh action and were merely executing the 2000 Order. In any event, it was submitted that encl 292 was in effect the appellants' attempt to bring a fresh action disguised as carriage of a decree of specific performance to completion.

[32] Learned counsel for the respondent contended that encl 292 attempted to bypass the various conditions that are to be specifically performed under the

2000 Order. It was therefore necessary for the appellants to satisfy their obligations under the sale and purchase agreements such as the conditions under cll 7 and 8 of the agreement before they could be registered as the proprietors of the land.

[33] It was also submitted that an executing court could not go behind the directions of the 2000 Order to vary the same. In support of that proposition learned counsel for the respondent cited the decision of the Indian Supreme Court in *Jai Narain Ram Lundia v Kedar Nath Khetan and others* 1956 AIR 359.

[34] With regard to the third question of law posed in this appeal it was submitted that the facts in *Daud v Ibrahim* are very similar to the facts of the present case.

DECISION OF THIS COURT

[35] Subsections (3) and (6) of s 6 of the Limitation Act 1953 read as follows:

> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
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> ...
>
> (6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[36] The main issue in this appeal is whether the Court of Appeal is right to hold that the appellants' application in encl 292 dated 7 October 2015 was barred by limitation by virtue of s 6(3) of the Limitation Act 1953. Among the reasons given by the Court of Appeal are as follows:

> 19. We must not forget that the 2000 High Court order as it stood then and now stands is a judgment which is subject to the provisions of Limitation Act 1953. Of relevance to this case is s 12 (sic) which reads as follows:
>
> > An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interests in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
>
> 20. In our view, there was little doubt that the application made by the respondents was an 'action' as defined in s 2(1) of the Limitation Act which states that *'action' includes 'a suit or any other proceeding in a Court of law'. The notice of application in this case was a 'proceeding in a Court of law'*.

...

23. We see no reason to depart from what was said in the just quoted cases. There is no exception to the 12 years limitation period provided by law. We must not lose sight of the fact that when a successful litigant obtains a judgment, that judgment is clothed with rights and obligations. The successful litigant has the rights to execute on that judgment but he or she is obliged to execute those rights within the 12 years limitation period provided by law. Failure to do so will have the consequence of rendering that judgment nugatory and unfortunately for the respondents here, they have forgone their acquired rights.

...

25. This was simply a case where the respondents had acquired a judgment which they had sat on it for more than 12 years and in an attempt to circumvent the limitation period of 12 years made this application to amend or vary the order of 'specific performance' to an order of 'declaration that the Appellant is a trustee of Lot 513'. These two orders are different in nature and when the trial judge refused the prayer of declaration of trusteeship and granted an order of specific performance in 2000, it could not be changed in the circumstances of this case.

[37] The Court of Appeal failed to consider the effect of the incidental or ancillary order made by the Court of Appeal on 25 October 2005 to the 2000 Order where the appellants were given liberty to make application for additional orders in respect of the order for specific performance. By filing the application in encl 292, the appellants were in effect carrying that decree to completion. As such, it is not correct to say that by filing encl 292, the appellants were filing a fresh action. Furthermore, once specific performance has been decreed no question of filing a fresh action arises.

[38] The law is clear that when an order for specific performance is made, the contract remains in effect and is not merged in the judgment for specific performance, and a court of equity or one exercising equity jurisdiction, maintains full control of the matter. This proposition of law was accepted by the House of Lords in *Johnson and another v Agnew* as follows:

> Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. This is clear law, best illustrated by the judgment of Greene MR in *Austins of East Ham Ltd v Macey* in a passage which deals both with this point and with that next following. It repays quotations in full:
>
> > The contract is still there. Until it is got rid of, it remains as a blot on the title, and the position of the vendor, where the purchaser has made default, is that he is entitled, not to annul the contract by the aid of the court, but to obtain the normal remedy of a party to a contract which the other party has repudiated. He cannot, in the circumstances, treat it as repudiated except by order of the court and the effect of obtaining such an order is that the contract, which until then existed, is brought to an end. The real position, in my judgment, is that, so far from proceeding to the enforcement of an order for specific performance, the

A vendor, in such circumstances is choosing a remedy which is alternative to the remedy of proceeding under the order for specific performance. He could attempt to enforce that order and could levy an execution which might prove completely fruitless. Instead of doing that, he elects to ask the court to put an end to the contract, and that is an alternative to an order for enforcing specific performance.

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Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in *Austins of East Ham Ltd v Macey* (and see *Sudagar Singh v Nazeer* per Megarry VC) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry VC puts it that he is refusing to complete.

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[39] The word 'action' is defined in s 2(1) of the Limitation Act 1953 to include 'a suit or any other proceeding in a court of law'. In *WT Lamb & Sons v Rider; Same v Same*, the English Court of Appeal had this to say on the meaning of the word 'action' as defined in s 2(4) of the Limitation Act 1939:

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Limitation Act, 1939, is wide, but we are unable to see how this fact gets the plaintiffs within measurable distance of the conclusion which they seek to found on it. The reason for including 'any proceeding in a court of law' in the meaning of the word 'action' is sufficiently apparent when one sees that many of the actions dealt with by the Act (eg, foreclosure and redemption actions) are normally commenced by originating summons and not by writ. No more weight can be attached to this definition than could have been attached to s 40 of the Act of 1833 in which the words 'action or suit or other proceeding' were prefatory to a number of different kinds of proceedings, some at common law, some in equity, and would require, accordingly, to be read distributively. The language of s 2(4) of the Act of 1939 in itself is plain and re-enacted existing law. To resort to the definition section, not otherwise required, in order to show that the legislature were intending to blend together matters respectively of substantive law and of procedure which had never been blended before is to adopt what is to our mind, a bold but illegitimate course. The relevant provisions of the Real Property Limitation Acts, 1833 and 1874, and of the Limitation Act, 1939, dealt, in our opinion, with the substantive right to sue for and obtain a judgment, and with that alone. The Common Law Procedure Act 1852, and RSC, Ord 42, were concerned, and concerned alone, with procedural machinery for enforcing a judgment when obtained. The two subjects were formerly quite independent and distinct, the one from the other, and we are quite unable to attribute to the definition of 'action' in the Limitation Act, 1939, the effect of merging the two together. We are satisfied that the plaintiffs attack on the validity of RSC, Ord 42, r 23(a), is without foundation, and, accordingly, that he has no right to proceed to execution except with the leave of the court under that rule. As to the necessity for such leave, counsel for the plaintiffs further argued that even after the expiration of six years a plaintiff is entitled to execution as of right unless a change has taken place by death or otherwise in the parties entitled or liable

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to execution. In our judgment, however, the issue of execution is within the discretion of the court after six years have elapsed, even where no such change has occurred.

[40] In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd*, a judgment for costs was obtained against the appellant company and it became enforceable in January 1998. The judgment debt remained unpaid and in February 2004 the respondent company as judgement creditor presented a winding up petition against it. The appellant applied to strike out the petition, contending: (i) that it fell within the definition of 'action' in s 38(1) of the Limitation Act 1980, which included 'any proceeding in a court of law'; and (ii) that as the action was brought upon the costs judgment it was statute-barred under s 24(1) of the 1980 Act, which provided that 'an action shall not be brought on any judgment' after the expiration of six years from the date on which the judgment became enforceable. The judge dismissed the application and the appellant appealed.

[41] The Court of Appeal through Mummery LJ, made the following observation on the word 'action' as defined in s 2(4) the Limitation Act 1939:

> [10] The expression '[a]n action ... upon any judgment' in s 2(4) of the 1939 Act was interpreted by the Court of Appeal in *WT Lamb & Sons v Rider* [1948] 2 All ER 402; [1948] 2 KB 331 as applying only to suing for a judgment upon a judgment. It did not apply to execution of a judgment. The Court of Appeal rejected the contention that the provision in the RSC (Ord 42, r 23(a)) which required a judgment creditor, after the elapse of six years from the date of the judgment, to obtain the leave of the court to levy execution, was rendered invalid by s 2(4) of the 1939 Act, which allowed 12 years for bringing an action upon any judgment as of right.
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> [14] In the light of the conclusions reached by the court on its historical survey the *Lamb* case is authority for the proposition that the limitation period set by s 2(4) only applied to an action brought by a judgment creditor suing upon his existing judgment for another judgment. For limitation purposes an action brought upon a judgment to obtain another substantive judgement was distinct from the procedural steps taken to execute an existing judgment.

[42] In *Lowsley and another v Forbes (t/a LE Design Services)*, one of the issues which had to be decided by the House of Lords was whether the word 'action' which was defined by s 38(1) of the Limitation Act 1980 as including 'any proceeding in a court of law' bars execution of a judgment after six years, or whether it only bars the bringing of a fresh action on the judgment. At p 906 of the report Lord Lloyd of Berwick held:

> For all these reasons I would hold that the first question must be answered in favour of the plaintiffs. 'Action' in s 24(1) means a fresh action, and does not include

A proceedings by way of execution. It is unfortunate that the decisive point in the case did not emerge until the very end of the hearing. But having considered the point in the light of Mr Hockman's written submissions, I am not left in any doubt as to the correct answer. I would therefore uphold the Court of Appeal on the first point, albeit for different reasons.

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[43] The case of *Lowsley and another v Forbes (t/a LE Design Services)* was considered by this court in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* where the following observation was made:

C Of course both the *Lim Ah Hee*'s case and the *Malaysian Soil Investigation*'s case were heard in the High Court before *Lowsley and another v Forbes (t/a LE Design Services)* [1998] 3 All ER 897 was decided. To say that *Lowsley*'s case overruled *Lamb*'s case is also not right as the headnote merely states that *Lamb*'s case was considered. As for the word 'action', the House of Lords held that on a true construction of that word in the relevant law, it must mean a fresh action and did not include proceedings by D way of execution. Accordingly, the section did not bar execution of a judgment after six years but only barred the bringing of a fresh action on the judgment.

[44] The Court of Appeal, inter alia, relied on the decision in *Daud v* E *Ibrahim* to hold that the appellants' application under encl 292 was barred by the limitation of 12 years under s 6(3) of the Limitation Act 1953.

[45] In that case the plaintiff bought a piece of land from the first defendant and paid for it. The first defendant sold it to the second defendant and the F second defendant knew that the land had already been bought by the plaintiff. The magistrate ordered the second defendant to transfer the land to the plaintiff.

[46] The second defendant appealed to the Second Division of the High G Court and his appeal was dismissed. He then appealed to the First Division of the High Court and this appeal was also dismissed.

[47] The second defendant however took no steps to transfer the land to the H plaintiff. The order of the magistrate contained no provision for compelling the second defendant to transfer the land or for enabling it to be transferred if the second defendant refused or neglect to transfer it.

[48] The plaintiff took no steps to execute his judgment until 5 January I 1959, when he made an application to the Alor Star Magistrate for an order calling upon the second defendant to show cause why he should not be compelled to execute a transfer of the land in the plaintiff's favour. This application was dismissed by the magistrate on 13 January 1959 on the ground that it was statute-barred.

[49] The plaintiff did not appeal from the magistrate's decision but, instead, took the course of making an application to the High Court by summons-in-chambers dated 11 February 1959 for an order varying the order of the First Division of the High Court dated 17 February 1940. The learned judge to whom the application was made took the view that this was a case for the exercise of the inherent power of the court to vary its own order so as to carry out its meaning or to make its meaning plain. The learned judge allowed the plaintiff's application. The second defendant appealed against that decision to the then Court of Appeal.

[50] The then Court of Appeal allowed the second defendant's appeal. Good JA who delivered the judgment of the court, inter alia, held:

> The respondent elected, instead of appealing, to circumvent the decision of the Magistrate in 1959 by starting proceedings de novo in the High Court; but here, says the appellant, he was statute-barred. It is true, as the learned judge has correctly pointed out, that where the question is one of exercising the inherent discretion to vary an order to effect or explain its intention, 'lapse of time has nothing to do with the question': *Hatton v Harris (2)*. But the purpose of the proceedings commenced by the summons-in-chambers here was to obtain execution of a judgment. Such proceedings must, under the Kedah Limitation Enactment (No 60) which was repealed on the 18th February, 1953, be brought within twelve Muslim years from the date of the judgment, and, under the Limitation Ordinance, 1953, which came into force on the 19th February, 1953, within 12 Gregorian years from the date on which the judgment became enforceable.

[51] Having carefully considered the judgment in *Daud v Ibrahim*, we are of the view that the facts in that case are distinguishable. In the instant case the Court of Appeal had made incidental order on 25 October 2005 in respect of the carriage of the specific performance decree. As mentioned earlier the appellants made their application pursuant to that incidental order. As such, the issue in the instant case concerned with the court's continued supervisory control over the specific performance decree in its equitable jurisdiction.

[52] In this connection, we find the following observation of the English High Court in *Yarwinder Gill v Siu-May Tsang, Pamigold Limited* to be useful:

> 33. Specific performance is an equitable remedy. Once granted, the contract remains in force and is not merged in the judgment. But, that said, the equitable nature of the remedy does not stop with the grant of the order. The court controls the working out, variation or cancellation of the order. Equitable principles apply to these processes.
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> 34. The principles I have stated were enunciated by Lord Wilberforce in a vendor's action for specific performance in *Johnson v Agnew* [1980] AC 367 at pages 392 ff. It is worth setting out two short passages at pp 394 and 399 verbatim:
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> > Fifthly, if the order for specific performance is not complied with by the

purchaser, the vendor may either apply to the court for enforcement of the order, or may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition is as stated in *Austins of East Ham Ltd v Macey* [1941] Ch 338 (and see *Singh (Sudagar) v Nazeer* [1979] Ch 474, 480, per Megariy VC) and is in my opinion undoubted law, both on principle and authority. It follows, indeed, automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied, or as Megarry VC puts it [1979] Ch 474, 480, 790, that he is refusing to complete.

Once the matter has been placed in the hands of a court of equity, or one exercising equity jurisdiction, the subsequent control of the matter will be exercised according to equitable principles. The court would not make an order dissolving the decree of specific performance and terminating the contract (with recovery of damages) if to do so would be unjust, in the circumstances then existing, to the other party, in this case to the purchaser. (To this extent, in describing the vendor's right to an order as 'ex debito justitae' Clauson LJ may have put the case rather too strongly: *John Barker & Co Ltd v Littman* [1941] Ch 405, 412). This is why there was, in the Court of Appeal, rightly, a relevant and substantial argument, repeated in this House, that the non-completion of the contract was due to the default of the vendors: if this had been made good, the court could properly have refused them the relief sought.

35. Nothing in these passages deprives the court of its equitable jurisdiction to make the order for specific performance work. There is not, as Mr Mark Warwick, counsel for Pamigold, suggested, a stark choice between enforcing or dissolving the order. The court may, in my judgment, make such orders as are just and equitable in the circumstances then existing, to give practical effect to the order it has made. In making its order work in the circumstances then arising, the court is not re-writing or even varying the contract between the parties. It is providing a mechanism to give the claimant what he bargained for, namely the sale or purchases of land. Such relief may be granted in a whole range of circumstances in which a defendant has failed to perform both his original contract and the court's subsequent order. If Mr Warwick were right, an inappropriate and unnecessary rigidity would be introduced into the equitable remedy of specific performance.

[53] The case of *Johnson and another v Agnew* was referred to by the Supreme Court in *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 at p 157 where it was said:

In *Johnson and another v Agnew* the House of Lords varied the order of the Court of Appeal holding that if a vendor obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract. On such an application he could be awarded damages at common law for breach of contract since the contract was not rescinded ab initio but remained in existence until it was terminated by the court.

[54] It is true that *Johnson and another v Agnew* does not deal with the issue

of limitation, unlike the instant case. What is important however is the principles of law enumerated in the judgment of the House of Lords in that case which had been aptly summarised in para 33 of the judgment of the case of *Yarwinder Gill v Siu-May Tsang, Pamigold Limited* that once specific performance is granted, the contract remains in force and is not merged in the judgment. The court controls the working out, variation or cancellation of the order pursuant to equitable principles.

[55] Based on the decision of the English cases which have been referred to earlier in this judgment, we are of the view that the word 'action' in ss 2(1) and 6(3) of the Limitation Act 1953 must mean a fresh action and did not include an application to have carriage of a decree of specific performance to completion.

[56] Enclosure 292 is not a fresh action. The appellants are not suing for a decree of specific performance as they already had a decree. The appellants are merely carrying that decree to completion and the order of the Court of Appeal dated 25 October 2005 gave them liberty to pursue the carriage of the order.

[57] On the facts of this case we find that s 6(3) of the Limitation Act 1953 is not applicable. In any event, we find that the appellants' application was filed within the 12 years period. The appellants filed their application pursuant to the incidental order given by the Court of Appeal on 25 October 2005. Enclosure 292 was filed by the appellants on 7 October 2015. It was therefore filed within 12 years from the date of the order of the Court of Appeal.

[58] It was contended by learned counsel for the respondent that Lot 513 could not be transferred to the appellants as various conditions in the contracts including cll 7 and 8 were not fulfilled. The learned judicial commissioner held that based on the circumstances of the case it was appropriate for him to exercise the inherent power of court to order the transfer of Lot 513 to the appellants. The learned judicial commissioner gave the following reasons for his decision.

> 8. It is also apparent that specific performance in accordance with the strict terms of the SPAs will no longer be possible, as a result of the act of Tan Ah Tong to charge Lot 512 for a second time, which had resulted in the sale of Lot 512 by way of public auction by the chargee in foreclosure proceedings. The SPAs contemplated that Lots 512 and 513 would be amalgamated and then subdivided, such that some of the subdivided plots would be located partly in each of Lots 512 and 513 (see the layout plan attached to the SPAs in exh SSJ3 of encl 293). As the first defendant is no longer the registered proprietor of Lot 512, it will not be possible for him to perform the obligations of Tan Ah Tong under the SPAs in accordance with their strict terms, even if he were so minded to do so.

A 9. As a consequence, I am of the view that this court may grant the order seeking for the transfer of the subject land to applicants, even though the High Court order of 25 March 2000 granted specific performance of the SPAs. Due to the fact that the SPAs are no longer capable of being specifically enforced in accordance with their terms as a result of the foreclosure proceedings in respect of Lot 512, it would be B open to this court to order that Lot 513 be instead transferred to the applicants, based on the inherent jurisdiction of the High Court.

10. Based on the circumstances of this case, I am also of the view that this is an appropriate situation for the exercise of the inherent power of court to order relief that differs from the prior order granted. The plaintiffs have been out of pocket for C over 40 years. Even though they had obtained an order for specific performance, the first defendant and his father before him have not complied with that order for 16 years. Moreover, compliance with that order for specific performance has now become impossible, due to the fact that part of the land on which the development was supposed to have stood has now been sold.

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[59] With regard to the issue of the inherent jurisdiction of the court, the Court of Appeal had this to say:

24. Furthermore, if we were to sustain the rationale of the learned judge, we would in fact be ignoring the law. The court's inherent jurisdiction is not unfettered. The E phrase 'in the interest of justice' upon which the inherent jurisdiction of the court is anchored on must, with respect, be interpreted within the boundary of the law. The learned JC had opined that the circumstances had changed since the date of the 2000 High Court order and hence in 'the interest of justice', the appellant ought to be made a trustee of Lot 513. With respect, there was no explanation as to when that F change in circumstances occurred. If it had occurred or about to occur within the 12 year limitation period, the respondents must explain why no step was taken to execute the 2005 (sic) High Court order. No such explanation was before the court.

G **[60]** As mentioned earlier the courts below failed to take into account the incidental order made by the Court of Appeal on 25 October 2005 which gave the appellants the liberty to make application for additional orders in respect of the order for specific performance. By virtue of that incidental order, the court is given wide powers to order any form of relief in accordance with the H equitable principles as the court controls the working out, variation or cancellation of the order for specific performance (*Yarwinder Gill v Siu-May Tsang, Pamigold Limited*).

[61] On the facts of the case we agree with the decision of the learned judicial I commissioner that this is an appropriate case for the court to exercise its inherent power to order Lot 513 be transferred to the appellants.

CONCLUSION

[62] For the foregoing reasons we answer the three questions of law posed in this appeal in the negative. We therefore allow the appellants' appeal with costs. The order of the Court of Appeal dated 11 October 2016 is set aside and the order of the High Court dated 10 March 2016 is restored, albeit for different reasons.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor